

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 27 June 2007

CASE NOS.: 2006-LHC-1976, 2006-LHC-1977, 2006-LHC-1978, and 2006-LHC-1979

OWCP NOS.: 07-159053, 07-161567, 07-174107, and 07-171342

IN THE MATTER OF

**M.G.,
Claimant**

v.

**LAKE CHARLES STEVEDORES, INC.,
Employer**

and

**PORTS INSURANCE CO., INC.,
Carrier**

and

**J.J. FLANAGAN STEVEDORES,
Employer**

and

**SIGNAL MUTUAL INDEMNITY ASSN., LTD.,
Carrier**

APPEARANCES;

**M.G.,
Pro Se**

**Allan Brackett, Esq.,
Derek Mercer, Esq.,
On behalf of Lake Charles Stevedores and Ports Insurance Company**

Mike Murphy, Esq.,

On behalf of J.J. Flanagan and Signal Mutual Indemnity Association, Limited

BEFORE: Clement J. Kennington

Administrative Law Judge

DECISION AND ORDER ON RECONSIDERATION

On May 21, 2007, Claimant filed a Reconsideration Petition consisting of 38 hand printed pages in which he alleged: (1) a denial of his right to call witnesses in support of Section 48(a) allegations of discrimination by Lake Charles Stevedores, and J.J. Flanagan (LCS and JJF) in refusing to hire him; (2) LCS and JJF refusing to allow him to chose a psychiatrist to evaluate his mental state and refute any allegation of being disabled due to mental impairments; (3) temporary total disability (TTD) from April 25, 2005 through present; (4) none of the 52 week periods preceding Claimant's four injuries represent Claimant's earning potential with Claimant missing 300 hours of work from October, 1999, through September 27, 2000, due to complications associated with his wife's pregnancy, plus an additional 30 days of missed work when suspended by ILA Local 2047 for misconduct.

On May 25, 2007, Claimant filed a supplement to his Reconsideration Petition consisting of 56 hand printed and typed report alleging his April 25, 2005 injury, exacerbated orthopedic condition entitling him to continued TTD, plus attorney fees. Attached to this supplement is a letter from Dr. Thomas B. Ford to LCS attorney Derek M. Mercer concerning his evaluation of Claimant on February 24, 2005 in which Dr. Ford opined: (1) Claimant's January, 2001, incident caused the initial disability, which in turn, was not worsened by August, 2001 incident; (2) Claimant's July, 2004, accident did not result in a major change in Claimant's condition, and (3) as of February 4, 2005, Claimant had a 10% permanent partial impairment of his right upper extremity.

On June 1, and 7, 15 and 18, 2007 Claimant submitted additional requests for a psychiatric examination by a physician of his choice and for remand of his claims to the District Director to address unspecified new issues dealing with Sections 8 (f), 912, 913, 921 while alleging unspecified violations of due process under 5 U.S.C.A. §§ 555, 556, and 557.

Concerning the first issue of not allowing Claimant to call witnesses in support of a Section 48 (a), the undersigned after listening to objections from LCS and JJF told Claimant that inasmuch as he had not raised any Section 48 (a) allegation before the District Director that he would not be allowed to raise that issue for the first time before the undersigned because to do so would violate LCS and JJF's right to prior notice. *Bukovac v. Vince Steel Erection Company*, 17 BRBS 122 (1985); *Carlow v. General Dynamics Corporation* 15 BRBS 115 (1982). However, the undersigned told Claimant that if he was interested in pursuing such a claim he should first do so before the District Director. (Tr. 159-179).

Concerning the issue of not being allowed to choose his own psychiatrist, Claimant never raised that issue before the undersigned either prior to or at the hearing so as to either receive treatment or an independent evaluation. Indeed it appears that Claimant had no apparent need for such services inasmuch as he based his claim for TTD solely upon physical restrictions. In any event Claimant's lack of cooperation when appearing before Dr. Culver, LCS's psychiatrist, militates against Claimant request for a psychiatrist of his own choosing.¹

Regarding the issue of TTD from April 25, 2005 to present, Claimant submitted for the first time a series of back to work forms signed by either Dr. Bernauer and/or Dr. Stephen J. Flood indicating Claimant was not able to return to work. None of these forms list reason for the assessment. As the undersigned indicated on page 13 of the initial decision, he was not impressed by Dr. Bernauer's assessments which frequently changed due only to subjective pain complaints and which were at odds with Drs. Gunderson and Yanicko's assessments, Dr. Bernauer's assessments were even in conflict with his own testimony wherein he claimed never rescinding light duty restrictions for Claimant yet allowing him to lift up to 110 pounds for up to 30 hours per week.

Regarding the issue of average weekly wage (AWW) Claimant would have me credit him with an additional 300 hours of work during his wife's complicated pregnancy, plus an additional 30 days of work when suspended from use of the hiring hall for misconduct. To credit him with such work, however would be to engage in mere speculation for there is no showing when Claimant absent these circumstances would have worked. The calculation of AWW is set forth in fn. 4, 7, 9, 11 and at pages 17-19 of the Decision.

Finally the undersigned finds no basis for holding separate hearings on each of Claimant's four injuries or finding violations of the Act or 5 U.S.C.A. §§ 555, 556, and 557 as alleged. Again Claimant is advised to file charges with District Director if he has any proof of Section 48(a) violations, thereby giving all parties adequate notice and opportunity to respond.

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**CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE**

¹ On June 25, 2007, LCS filed an opposition to Claimant's motion for reconsideration. In turn Claimant filed objections to LCS's opposition.